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# IN THE COURT OF APPEALS OF INDIANA

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| ROBERT J. KING, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 34A05-0802-CR-73 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Judge
Cause No. 34D01-0604-FD-282

**August 22, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Robert J. King appeals his conviction of Class D felony possession of marijuana.[1] He claims his trial counsel was ineffective because he did not object to hearsay testimony and police reports identifying King as the person who threw marijuana from a car. Because those statements were not hearsay, an objection would have been overruled. Thus, King has not demonstrated his counsel was ineffective, and we affirm.

## FACTS AND PROCEDURAL HISTORY

On April 1, 2006, Kokomo police officers Derek Kidwell and Aaron Tarrh began following a car because the license plate was not illuminated. Once they stopped the car, Officer Tarrh approached the driver's side and Officer Kidwell approached the passenger side. Officer Kidwell asked the front seat passenger, Jamie Nussbaum, to exit the car. Upon questioning by Officer Kidwell,[2] Nussbaum stated the driver, King, had thrown a baggie of marijuana out of the car at a prior intersection.

Officer Ryan Howard Shuey arrived at the scene with a dog. Nussbaum told Officer Shuey that King had thrown marijuana out of the car around the corner of Washington and Morgan Streets. Officer Shuey and his dog found a bag of marijuana about fifty yards from that intersection.

The State charged King with possession of marijuana. When Officer Tarrh served a subpoena on Nussbaum, she told him King threw a bag of marijuana out the window.

At trial, Nussbaum testified a backseat passenger threw something out the

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[1] Ind. Code § 35-48-4-11(1).

[2] Officer Kidwell testified he inquired whether there were drugs or weapons in the car, and Nussbaum testified the officer "said that they seen somebody throw something out of the car and they wanted to know what was throwed [sic] out of the car." (Tr. at 114.)

window, and she claimed she told that to the officers at the scene. Officers Kidwell, Shuey, and Tarrh testified Nussbaum identified King as the person who had thrown marijuana out of the car, and police reports admitted at trial indicated Nussbaum identified King as the person who threw the marijuana. The jury found King guilty.

## DISCUSSION AND DECISION

We review ineffective assistance of counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh'g denied*. First, the petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002), *reh'g denied*. Second, the petitioner must demonstrate he was prejudiced by his counsel's deficient performance. *Wentz*, 766 N.E.2d at 360. To show prejudice, a petitioner must demonstrate a reasonable probability that the result of his trial would have been different if his counsel had not made the errors. *Id.* A probability is reasonable if our confidence in the outcome has been undermined. *Id.*

We presume counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. *Smith*, 765 N.E.2d at 585. "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* If we may easily dismiss an ineffective assistance claim based on the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Wentz*, 766 N.E.2d at 360.

King claims his counsel was ineffective for failing to object to testimony that Nussbaum identified King as the person who threw the marijuana from the car and for failing to object to the police reports indicating Nussbaum identified King as the thrower.[3] "[I]n order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show an objection would have been sustained if made." *Overstreet v. State*, 877 N.E.2d 144, 155 (Ind. 2007). King argues the evidence should have been objected to as inadmissible hearsay. He is wrong.

Ind. Evidence Rule 801(d)(1) provides: "A statement is not hearsay if: . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made shortly after perceiving the person . . . ." Such statements are not hearsay because "the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement." *Robinson v. State*, 682 N.E.2d 806, 811 (Ind. Ct. App. 1997) (quoting Fed. R. Evid. 801(d)(1)(C) advisory committee's note). Additionally, their reliability "does not depend on the rationales of reliability that undergird other exceptions to the hearsay rule." *Id.* (quoting 13 Robert Lowell Miller, Jr., Indiana Practice § 801.401 (2d ed. 1995)). Rather,

> [t]he reasons for admitting identification statements as substantive evidence are that out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial, and the availability of the declarant for cross-examination eliminates the major

[3] King does not challenge counsel's failure to object to testimony regarding Nussbaum's identification of the item as a bag of marijuana, only testimony regarding her identification of King as the person who threw the bag.

> danger of hearsay testimony. One of the reasons for the creation of this rule was to remedy the situation where a witness identifies the defendant before trial and then at trial, because of fear or other reasons, recants the previous identification.

*Id.* (internal quotations and citations omitted).

The officers' testimony that Nussbaum, at the scene of the traffic stop, identified King as the person who threw the marijuana out of the car was not hearsay. *See id.* Based on the same reasoning, neither would a hearsay objection based on the inclusion of Nussbaum's identification of King have resulted in exclusion of the police reports.

Had King's counsel objected on that ground, the trial court would have overruled the objection. *See id*. ("Because [declarant] testified at trial and was subject to cross examination concerning the statement, and because his statement was one of identification made shortly after perceiving the person, it was properly admitted over the hearsay objection."). Accordingly, King has not demonstrated his counsel was ineffective. *See Monegan v. State*, 721 N.E.2d 243, 254 (Ind. 1999) (failure to object was not ineffective assistance, where objection would have been overruled).

Affirmed.

MATHIAS, J., and VAIDIK, J., concur.